

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV 26 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOHN O'BRIEN,

Petitioner,

v.

THE HON. RICHARD FIELDS, Judge of
the Superior Court of the State of
Arizona, in and for the County of Pima,

Respondent,

and

THE STATE OF ARIZONA,

Real Party in Interest.

2 CA-SA 2008-0063
DEPARTMENT B

DECISION ORDER

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR-20070973

JURISDICTION ACCEPTED; RELIEF GRANTED

Robert J. Hirsh, Pima County Public Defender

Tucson
Attorney for Petitioner

Terry Goddard, Arizona Attorney General
By Kathryn J. Winters

Tucson
Attorneys for Respondent

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Real Party in Interest

¶1 In his petition for special action relief, attorney John O’Brien challenges the respondent judge’s order sanctioning O’Brien in the underlying criminal proceeding by requiring him to pay a fine of \$250 and refusing O’Brien’s request to follow the procedures under Rule 33, Ariz. R. Crim. P. O’Brien has no equally plain, speedy, or adequate remedy by appeal, therefore, we accept jurisdiction of this special action. *See Riley v. Superior Court*, 124 Ariz. 498, 499, 605 P.2d 900, 901 (App. 1979).

¶2 The limited record provided to us establishes that, at a status conference on June 10, 2008, the respondent judge acknowledged the state’s request that the court sign an order requiring O’Brien’s client, defendant Christopher Matthew Payne, to appear at any subsequent proceedings. In lieu of signing the order, the respondent directed O’Brien to file, by the time of the subsequently scheduled status conference, a written waiver by Payne of his right to appear. The transcript from the subsequent status conference on July 17 establishes Payne did not appear, O’Brien did not provide the signed waiver as ordered, and the respondent sanctioned O’Brien by ordering him to pay a fine of \$250. Although the

respondent did not expressly find O’Brien in contempt, the available record shows the fine was imposed as the result of O’Brien’s violation of respondent’s order to provide Payne’s waiver. Thus, the finding of contempt was implicit. *See* Ariz. R. Crim. P. 33.1 (defining criminal contempt).

¶3 The respondent judge later clarified that he had sanctioned O’Brien pursuant to Rule 15.7, Ariz. R. Crim. P., for failing to comply with the judge’s previously imposed disclosure order. Given the nature of the sanction, however, Rule 33 was nevertheless implicated. *See* Ariz. R. Crim. P. 15.7(a)(4) (including among available sanctions for failure to make disclosure, holding counsel in contempt). Consequently, O’Brien was entitled to an opportunity to establish his conduct was not “wilful[.]” Ariz. R. Crim. P. 33.1; *see also* Ariz. R. Crim. P. 33.2(b).

¶4 Because the respondent judge abused his discretion by failing to conduct proceedings pursuant to Rule 33 before effectively sanctioning O’Brien for contempt, O’Brien’s request for special action relief is granted, *see* Ariz. R. P. Spec. Actions 3, and this matter is remanded for proceedings consistent with this decision order.

PHILIP G. ESPINOSA, Judge

Judge Vásquez and Judge Brammer concurring.